



[2012]JMSC Civ. 65

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010 HCV04294

BETWEEN MICHAEL JAMES CLAIMANT

A N D COMMISSIONER OF POLICE DEFENDANT

**Michelle Clarke instructed by Dionne Cruickshank & Company
for the Claimant.**

**Harrington McDermott instructed by the Director of State
Proceedings for the Defendant.**

HEARD 26TH April, 2012

CORAM: ANDERSON, K., J.

[1] This matter concerns a Claim being pursued by means of Fixed Date Claim Form, which was filed on 15th June, 2011, seeking to have this Court Order that the decision of the Respondent to dismiss the Applicant from his employment with the Jamaica Constabulary Force be quashed. No other relief is now being sought by the Applicant, as at the Trial, the Applicant had withdrawn the only other relief which he had originally sought, this being an Order of Mandamus requiring the Respondent to reinstate the Applicant.

[2] Application for leave to apply for Judicial Review had previously been made by the Applicant and arising therefrom, leave was granted to the Applicant to so apply, on 2nd June, 2011.

[3] The Applicant's case centers around the following facts which are undisputed:- The applicant was at all material times, a police constable employed within the Jamaica Constabulary Force. As a serving member of the Jamaica Constabulary Force, the Applicant had, in 2004, received commendation from the then Commissioner of Police, arising from the recovery of a firearm. Also, it is noted that prior to the relevant disciplinary violations having been alleged against him, as are now being challenged before this Court, the Applicant had no record of any disciplinary sanctions ever having been recorded against him. The applicant joined the force ranks of the Jamaica Constabulary Force on 19th May 2000. On 21st November, 2006, however, things began to change dramatically for the applicant, as he was then arrested on a charge of rape and it seems, also on a charge of abduction (although this Court thinks that a typographical error may have been made in paragraph 4 of the Affidavit of Owen Ellington which was filed on 11th October, 2011- as regards the suggested offence of 'abduction.' The same has not been clarified, although this Court did invite the Crown to do so. In any event, as part of the investigation into the matters which led to the Applicant's arrest, an identification parade was held and the Applicant was thereat, positively identified by the complainant as the person who had, amongst other things, raped her. Subsequently, the matter was referred to the Director of Public Prosecutions who ruled that the Applicant be charged with the offences of Rape and Illegal Possession of Firearm. The trial of the Applicant upon those charges, was conducted in the Western Regional Gun Court on the 5th and 6th March, 2007. The Applicant's defence at Trial was that he had engaged in consensual sex with the complainant. The Applicant was acquitted of both charges and shortly thereafter, the Senior Superintendent at the Montego Bay Police Station, was officially informed of this, through correspondence which was sent to him by the Deputy Clerk of Court of the Resident Magistrate Court in the parish of St. James. At all material times, the applicant was attached to the Saint James division of the Jamaica Constabulary Force. Subsequent thereto, upon there having been further investigations into the criminal complaints, which were

conducted by members of the Criminal Investigation Branch of the Force, the matter was referred to the Commissioner of Police, who decided that disciplinary proceedings should be commenced against the Applicant. The Applicant was shortly thereafter, notified that the following disciplinary offences had been alleged against him and that he would have to answer to same and that such disciplinary offences, were instituted against him with a view to dismissal. The Court of Enquiry (this being the name ascribed by Police Service Regulations, to the relevant disciplinary tribunal in a case such as this), held its enquiry into the alleged disciplinary offences, between 9th February, 2009 and 22nd May, 2009. That Court of Enquiry at some point in time thereafter, this being upon a date which has not been made known to this Court by either party, concluded that it had found the two disciplinary offences proven. The Applicant was advised of that finding, at the same time that he was informed by the Commissioner of Police at that time, this being Rear Admiral Hardley Lewin, that he was dismissed. He was so advised by means of a correspondence dated 5th August 2009, which was a correspondence that had been addressed to the Assistant Commissioner of Police by the then Commissioner of Police and which was forwarded, as is, to the Applicant.

[4] It is not disputed that the Applicant played an active part through his counsel, Mr. Roy Fairclough, in the proceedings before the Court or Enquiry, at least insofar as the making of submissions to that 'Court' and the cross-examination of witnesses called to testify against the Applicant in respect of the disciplinary charges, are concerned. It is also not in dispute however, that the Applicant had no counsel present with him on the first day when the disciplinary tribunal's proceedings began, as Mr. Fairclough was, it seems from that which is recorded in the transcript of that tribunal's proceedings, unavoidably absent on that day. Nonetheless, at the close of the case against the Applicant as was led in the Court of Enquiry and before the Defence had responded, the Applicant's counsel, having then been present, made submissions as to the disciplinary

tribunal's proceedings having been pursued contrary to Regulation 37 of the Police Service Regulations 1961. That particular Regulation provides as follows:

“A member acquitted of a criminal charge shall not be dismissed or otherwise punished in respect of any charge of which he has been acquitted, but nothing in this regulation shall prevent his being dismissed or otherwise punished in respect of any other charge arising out of his conduct in the matter, unless such other charge is substantially the same as that in respect of which he has been acquitted.”

[5] Having carefully considered this matter, I am of the view that the allegations of a disciplinary nature, as were made against the Applicant, were substantially the same as the criminal charges which were made against him and no doubt, that was why, the evidence as led at the proceedings before the Court of Enquiry, mirrored evidence which would have been expected to have been led at the criminal trial which had earlier unsuccessfully been pursued by the Crown as against the Applicant. Thus, the complainant was called upon to testify in full detail about the alleged rape of her by the Applicant and other evidence was led in an effort to substantiate the complainant's testimony in that regard.

[6] The Court of Enquiry was not however, of the same view then, as this Court is now and thus, they entirely rejected the Applicant's Attorney's submissions to them in that regard, having concluded , as is recorded in the transcript of the Court of Enquiry's disciplinary hearing in relation to the Applicant , that they were not interested in determining whether the Applicant was guilty or not, but rather, all that they were concerned about was his arrest. Clearly however, this was not so, because if it was, the Court of Enquiry would not have needed to have called upon anyone other than the arresting officer to have testified at the enquiry. That was not however, what was done.

[7] In the circumstances, this Court is of the conclusion that the Court of Enquiry acted outside of or beyond its jurisdiction in having embarked upon the enquiry, which it did, in this particular case, in relation to the Applicant. The Commissioner of Police also would have acted outside of his jurisdiction in having ordered that such enquiry be held. As a consequence, regardless of the merits of the Court of Enquiry's conclusions, which this Court need make and has made no Judgment on, the decision by the Commissioner of Police, to dismiss the Applicant from the Jamaica Constabulary Force, this being a decision which was undoubtedly based on the findings of a Court of Enquiry which had not lawfully embarked upon the enquiry which it conducted in relation to the Applicant, must be and will be removed into this Honourable Court and quashed.

[8] Apart from that, there can also be no doubt that insofar as the Applicant was informed of the Commissioner's decision to dismiss the Applicant, which was undoubtedly itself based on the finding of the Court of Enquiry that both of the disciplinary allegations had been proven and was informed of such finding as made by the Court of Enquiry, at the same time, the Applicant was deprived of natural justice insofar as the penalty which was imposed on him (that being the penalty of dismissal), is concerned. The Applicant should have been afforded the right to place before the Commissioner of Police for his consideration, any relevant information or issues to be considered by the Commissioner of Police in exercising the independent discretion, which even the Crown in this case has properly conceded is expected to be exercised by the Commissioner of Police in respect of matters of punishment arising from the Court of Enquiry's finding that the disciplinary charge had been proven. The Applicant was, it can clearly be recognized, never afforded any such opportunity either by the Commissioner of Police or by the Court of Enquiry and if he ever was afforded such opportunity by the Court of Enquiry, then the transcript of that body's proceedings would have been expected to reflect this, but it does not. As a matter of law though, it is clear that since it is for the Commissioner of Police to decide on what sanction is to be imposed for any disciplinary offence committed by a serving member of the

Jamaica Constabulary Force below the rank of Inspector, it was imperative for the Commissioner of Police in exercise of his independent discretion to have afforded a hearing to the Applicant prior to having decided upon the sanction which was to be imposed upon him arising from the disciplinary charges found proven by the Court of Enquiry. The clear and obvious inference to be drawn from all of this, is that no such opportunity was afforded, and in that regard, the Applicant's right to natural justice, prior to his having been forcibly retired from his employment with the Jamaica Constabulary Force, was undoubtedly breached. This is so even though the Regulations do not expressly provide for the Applicant in a matter such as this, to have been afforded an opportunity to address the Commissioner on the matter of the punishment to be imposed. Nevertheless, the case law in this regard, is clear – This Court must and will rectify the omission of the legislature and fill in the gaps as it were, by providing for such procedural safeguards as will not only enure to the overall fairness of the proceedings, but also, simultaneously, assist in building confidence in members of the public at large, that even before administrative functionaries and tribunals, justice and fairness will and must go hand in hand. See in this regard: **Wiseman v Borneman, per Ld. Reid – [1971] A.C. 297, at p. 308 and Lloyd v McMahon, per Ld. Bridge – [1987] AC 625 , at p. 702 .**

[9] In the circumstances therefore, this Court removes the Commissioner of Police's Order that the Applicant be dismissed from the Jamaica Constabulary Force, into this Court and quashes that order. In addition, this Court Orders that such salary sums as have been withheld from the Applicant since the date when he was charged with the disciplinary offences as referred to herein, be paid to the Applicant by no later than 31st May, 2012. No interest is awarded by this Court, as none was sought by the Claimant in any of the Court documents filed by the Applicant, in which such either could or should have been sought.

Costs of the Claim are awarded to the Applicant with such costs to be taxed, if not agreed upon. These are the Orders of this Court.